COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2918 **Cir. Ct. No. 2005CV1140**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DANIEL RITTENHOUSE,

PLAINTIFF-APPELLANT,

V.

DAVID HULCE AND DH & ASSOCIATES, INC.,

DEFENDANTS,

THE ESTATE OF RON HULCE, BY ITS SPECIAL ADMINISTRATOR, I. GREGG CURRY, AND MICHAEL BEGRES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Daniel Rittenhouse appeals the judgment in his contract action against David Hulce, Ron Hulce, and Michael Begres. The case has a complex procedural history. Rittenhouse challenges several decisions or orders that resulted in the dismissal of his claims against Ron and Begres. As to Begres, we reverse and remand with directions that the original jury verdict against him be reinstated. As to Ron, we affirm.

BACKGROUND

¶2 This case arises from the proposed sale of a concrete restoration business started by Ron Hulce. Ron eventually passed primary control to his son David Hulce. After operating the business successfully for a few years, David lost interest and the business suffered. Michael Begres, one of the business's employees, then resigned his employment.

¶3 Another employee suggested that Daniel Rittenhouse should purchase the business. Rittenhouse was employed as an engineer for General Motors. Although Rittenhouse had no experience in the concrete restoration trade, he was interested in the opportunity. He met with David in late 2003 and again in early 2004. Ron also attended one meeting with David and Rittenhouse in 2004.

¶4 According to Rittenhouse, Ron promised to work in the business during the six months each year when David was away in Colorado. Ron would help transition the business to Rittenhouse, including training him and referring past customers, in exchange for reimbursement of health insurance premiums and work expenses. In April 2004, with no agreement having yet been reached, David

told Rittenhouse he would have to make up his mind on purchasing the business because David was not going to seek additional work unless he had an agreement to transfer the business. Rittenhouse testified that David agreed to help operate the business and teach Rittenhouse the necessary skills over a five-year period. David would be paid $25,000 a year for six months of work, plus a three percent commission on the work he brought in.

¶5 Rittenhouse gave General Motors notice that he was leaving in April 2004, and began working at the concrete business at the beginning of May. David introduced him to the employees, vendors and customers as the new owner. Although no stock or title to property changed hands, Rittenhouse received control of the business, including its accounts and physical assets. Various draft contracts were exchanged, but no written purchase agreement was ever signed.

¶6 The arrangement worked well during the summer of 2004. In fact, David had remained in contact with Begres and sent him favorable reports about Rittenhouse. David suggested that Rittenhouse should rehire Begres. Begres returned to work for the business in September, after David had left for Colorado.

¶7 The business encountered cash flow difficulties in the fall of 2004, and Rittenhouse had to lend money to the business to keep it afloat. Ron agreed to suspension of his health care payments and David ultimately agreed to postpone payments owed to him. Meanwhile, Begres had begun complaining privately to David about Rittenhouse. When David returned from Colorado in December, he unsuccessfully attempted to reconcile Begres to Rittenhouse. Begres quit in January 2005 and formed his own competing company.

¶8 David continued working with Rittenhouse until May 23, 2005 because he felt obligated to do so. However, David and Ron maintained contact

with Begres, who repeatedly questioned why they continued working with Rittenhouse. David eventually stopped working with Rittenhouse and began working with Begres. He took his customer base with him, and had also started sending Begres work while still on Rittenhouse's payroll. Additionally, Begres was aware that David wrote a proposal for a project for which David had already prepared a proposal while working for Rittenhouse. Ron also stopped working for Rittenhouse and brought work from his past customers to Begres. David and Ron both admitted to giving Begres the business and assistance they had previously given to Rittenhouse.

¶9 Rittenhouse's business struggled once the contracts secured by David ran out. Rittenhouse had invested approximately $95,000 of his savings into the business. General Motors would not rehire him. Rittenhouse sued David, Ron and Begres.

¶10 Following remand on a prior appeal, the case against all three defendants proceeded to trial. Rittenhouse presented the testimony of Ann DeRose, a certified public accountant with a specialty in forensic accounting. She presented her calculations of Rittenhouse's damages, but did not allocate the damages among the three defendants. According to DeRose, there was one indivisible loss.

¶11 Based on Rittenhouse's inability to specify the damages attributable to each defendant, the trial court ruled that the case would be dismissed unless Rittenhouse elected to proceed against only one. Rittenhouse objected, but elected to proceed against Begres, and the court dismissed David and Ron. The jury found that Rittenhouse and David had a contractual or prospective contractive

relationship and that Begres tortiously interfered with it. The jury awarded Rittenhouse $264,841 in past damages and $112,709 in future damages.

¶12 During trial, the court had taken under advisement a motion to dismiss for failure to prove damages. After the verdict was returned, the court denied the motion, stating, "I'm satisfied that the jury has had sufficient information with which to make a determination in this case." Begres filed motions to reconsider the motion for directed verdict, for a new trial, for remittitur, and for judgment notwithstanding the verdict. Rittenhouse, on the other hand, moved for judgment on the verdict against Begres and for reconsideration of the dismissal of David and Ron.

¶13 The court determined it had erred by dismissing David and Ron on the allocation of damages issue. The court further concluded it had created a conflict of interest because the same attorney represented both Begres and Ron, and the attorney had taken the position that Ron should be dismissed during the damages allocation matter.[1] The court observed that it would have been in Begres's interest to keep Ron in the case. Ultimately, the court held:

> So that in order to try the case, we should have had all three of the defendants in the case. … And I think that if I were to look at the interest of justice and judicial economy, it would direct me to the conclusion that I ought to retry this case, and I ought to retry this case with all of the parties involved. And that's what I intend to do.

[1] The attorney who represented both Ron and Begres had previously filed a waiver of conflict of interest.

Accordingly, the court ordered the verdict set aside over Rittenhouse's objection, brought Ron and David back into the action, and set the matter for further proceedings.

¶14 Subsequently, Begres and David moved for summary judgment, which the court denied. Additionally, Begres moved to sever the claim against him for trial. The court granted the motion. Because the claim against Begres had already been tried separately, Rittenhouse then moved for reinstatement of the verdict. The court took the motion under advisement.

¶15 Rittenhouse's claims against David and Ron proceeded to trial. At the end of Rittenhouse's case-in-chief, the court dismissed the contract claim against Ron, concluding Rittenhouse failed to present a prima facie case. The trial proceeded to verdict against David. The jury found that there was no contract, but that there was promissory estoppel. Because this was an equitable claim, the court increased the jury's award from $40,000 to $203,671, taking into consideration the amount awarded by the jury in the first trial.

¶16 Shortly thereafter, the court ruled on Rittenhouse's motion to reinstate the verdict against Begres. The written decision explained:

> The Court has reviewed the Plaintiff's Motion and supporting argument. The Court has also reviewed the Brief provided on behalf of Defendant Michael Begres. This Court is satisfied that when it determined that the Verdict should be set aside that it was appropriate because there was no credible evidence to support it.
>
> For the reasons set forth in the Court's original Decision setting aside the Verdict and since no new facts have been provided to suggest a contrary result, this Motion is denied.

¶17 Begres again moved for summary judgment dismissing the claim against him for tortious interference with a contract or potential contract. The

court granted the motion, based on its evaluation of the evidence in the trial against David and Ron.[2] The court determined that there was no evidence of a contractual relationship because the jury had already found that there was no contract. The court further concluded:

> The acrimony that the parties displayed toward each other as negotiations broke down satisfied this Court that they would never have reached an agreement. … This Court has gone through this analysis at great length to satisfy itself that there was no likelihood that a contract could have been entered into between the parties.

Rittenhouse now appeals the dismissals of his claims against Ron and Begres.

DISCUSSION

¶18 Rittenhouse first argues that the court should have entered judgment on the original verdict against Begres, both on the motion after verdict and the subsequent motion after the court granted Begres's motion to sever the trials. Alternatively, he argues the court erroneously granted summary judgment to Begres. Finally, Rittenhouse argues the court erroneously dismissed the claims against Ron.

Entry of judgment on the original jury verdict against Begres

¶19 For clarity's sake, we commence our analysis by observing what Rittenhouse does not argue. Rittenhouse does not develop any argument that the trial court erred based on its original stated premises for setting aside the verdict, i.e., the erroneous ruling that Rittenhouse must elect to proceed against only one

[2] In its summary judgment decision, the court also acknowledged that, at the first trial, it had reversed its decision and set aside the verdict because the court "had erred in requiring Rittenhouse to make an election."

defendant and on the perceived conflict of interest. Nor does Rittenhouse develop any argument that the court erred by denying his subsequent motion when the court erroneously observed it had originally set aside the verdict because the evidence was insufficient, and then determined that no new facts had arisen.

¶20 Instead, Rittenhouse argues only that both decisions denying entry of judgment on the original jury verdict against Begres were erroneous because there were sufficient facts to sustain the claim.

¶21 A motion challenging the sufficiency of the evidence should not be granted unless, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the plaintiff, there is no credible evidence to sustain the claim. WIS. STAT. § 805.14(1);[3] ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶23, 254 Wis. 2d 830, 647 N.W.2d 362. Similarly, we must affirm the jury's verdict if there is any credible evidence to support it. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). "When the verdict has the trial court's approval, this is even more true." ***Id.***

¶22 Here, following the jury's verdict, the court rejected Begres's motion challenging the sufficiency of the evidence of damages. Subsequently, the court conducted no further analysis of the sufficiency of the evidence. Rather, it only observed—mistakenly—that it had previously found the evidence lacking in some manner.[4]

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[4] We note that if the court had, in fact, determined the verdict was unsupported by the evidence, there would have been no occasion to set the matter for a new trial, or to subsequently address the claim against Begres on summary judgment.

¶23 The special verdict in the first trial asked (1) whether there was a prospective contractual relationship between David and Rittenhouse, (2) whether Begres substantially interfered with the prospective contract, (3) whether the interference was intentional, (4) whether the interference was a cause of Rittenhouse's damages, and (5) what amount of damages would fairly compensate Rittenhouse for his lost prospective contract. We conclude the jury was presented with credible evidence of each element.

¶24 There was substantial evidence of a prospective contractual relationship. It was evident that the parties sought to accomplish a transfer of the business and, in fact, substantially performed in furtherance of that goal. There was also evidence that Begres substantially interfered by attempting to convince both David and Ron to stop working with Rittenhouse. Not only were there communications to that effect, but David and Ron did, in fact, stop working with Rittenhouse and transferred their assistance and customer base to Begres. There was also evidence that Begres's interference was intentional; as an employee he was well aware of the prospective sale of the business to Rittenhouse, as well as Ron and David's assistance. As to the damages component, the circuit court already determined that element was supported by sufficient evidence. We agree, based on the testimony and exhibits presented by DeRose.

¶25 The trial court erred in the first instance by failing to enter judgment on the jury verdict without first determining that any element of Rittenhouse's claim against Begres was unsupported by credible evidence. *See* WIS. STAT. § 805.14(1), (5). We are further satisfied that any such determination would have been erroneous because there was sufficient evidence supporting the jury's findings, particularly given the requirement that the evidence must be viewed in

the light most favorable to the verdict. We therefore reverse the judgment and direct the trial court to enter judgment on the jury verdict against Begres.[5]

Dismissal of claims against Ron Hulce

¶26 Rittenhouse contends the circuit court erroneously dismissed the claims against Ron during the course of the second jury trial. Rittenhouse asserts there were claims for both promissory estoppel and breach of contract, and challenges the ruling as to both claims. However, we agree with Ron that Rittenhouse either abandoned his promissory estoppel claim or failed to preserve it.

¶27 After Rittenhouse's presentation of his case, the court observed, "I'm not satisfied that [Rittenhouse] has made a prima facie case against Mr. Ron Hulce for an existent contract which was breached." The court further indicated:

> I'm not satisfied that a prima facie case has been made that Ron Hulce entered into a contract with Mr. Rittenhouse. And, furthermore, even if I were so satisfied that such were the case, I don't have any indication that Ron Hulce breached that contract if, in fact, it existed.
>
> There is an insufficient amount of evidence that would allow a jury to even get to the question of weighing the credibility of those issues.

[5] Because we have determined the court should have entered judgment on the prior jury verdict, we need not address the trial court's subsequent dismissal of the claim against Begres on summary judgment. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

Further, we are aware there is a potential issue concerning whether the damages awarded against Begres are duplicative of those awarded against David. However, there is no trial court decision on the issue for us to review. In any event, David did not appeal, and it was Begres who successfully moved the court to sever the claims against him. We make no determination as to the propriety of further proceedings on this issue upon remand.

> Therefore, I am granting [the] motion to dismiss. I don't think it's a directed verdict. I think it is a motion to dismiss … against Mr. Ron Hulce with respect to the contract claims.
>
> So tomorrow the verdict form will be whether Mr. Dave Hulce entered into a contract; and, if so, did he breach it? Or in the alternative, if there was no contract, was there promissory estoppel and all of the components of that issue?

¶28 The court repeatedly referred only to a contract claim against Ron; it never referred to any promissory estoppel claim against him. Nor did Rittenhouse, at the time of the court's ruling or later when the verdict was prepared, mention any claim of promissory estoppel against Ron or seek clarification of the court's ruling. Under these circumstances, we can only assume that Ron abandoned the claim. At a minimum, he failed to preserve the issue for appeal. *See* WIS. STAT. § 805.13(3) ("Failure to object at the [instruction and verdict] conference constitutes a waiver of any error in the proposed instructions or verdict."); ***Northern States Power Co. v. Town of Hunter Bd. of Supv'rs***, 57 Wis. 2d 118, 132, 203 N.W.2d 878 (1973) (Issues that are not properly presented to the trial court will ordinarily not be considered for the first time on appeal.).

¶29 Finally, we address Rittenhouse's contract claim against Ron. Rittenhouse's appellate brief devotes three of its thirty-nine pages to a combined argument on Rittenhouse's promissory estoppel and contract claims. Most of those three pages are dedicated to the promissory estoppel issue. Rittenhouse fails to cite the elements of a breach of contract claim or explain how Ron is alleged to have breached any contract.

¶30 Given Rittenhouse's sparse treatment of the contract issue, we will uphold the trial court's determination that the terms were too vague to constitute a contract and that, in any event, there was no breach. *See* ***State v. Flynn***, 190

Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (We will not decide issues that are inadequately briefed or not supported by legal authority.); ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–45, 430 N.W.2d 366 (Ct. App. 1988) (We will not abandon our neutrality to develop arguments.). Indeed, Rittenhouse's failure to identify a breach requires that we affirm. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (An appellant who ignores the ground upon which the trial court ruled is deemed to have conceded the validity of that holding.).[6]

¶31 Rittenhouse shall be allowed costs against Begres. The Estate of Ron Hulce shall be allowed costs against Rittenhouse. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Rittenhouse further develops his breach of contract argument in his reply brief, but that does not excuse his failure to do so initially. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).